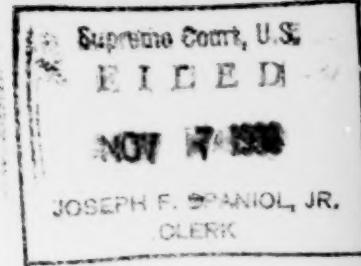


90-734



NO. _____

SUPREME COURT OF THE UNITED STATES

1990 TERM

PETER PAUL MITRANO,

PETITIONER,

VERSUS

KARIN C. RUBLE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

PETITIONER FOR WRIT OF CERTIORARI

Peter Paul Mitrano
Pro se
Post Office Box 190
Fairfax Station, Virginia 22039
(703) 591-7250



Question Presented for Review

1. Whether or not there was error in sustaining a demurrer based upon a finding that probable cause was stated within the transcript attached to the Motion for Judgment in a cause of action for malicious prosecution even though petitioner requested a trial by jury?

Rule 14 Statement

(a) Please see the preceding page numbered (i).

(b) The names of all parties to the proceeding appear in the caption of the case. There are no corporations that are parties in the proceeding and therefore there are no parent companies and/or subsidiaries to be listed as requested by Rule 29.1.

(c) Please see pages (v) and (vii) respectfully for the table of contents and table of authorities.

(d) The Supreme Court of Virginia in their Record No. 900759 refused petitioner's Petition for Appeal on August 10, 1990. The Circuit Court of Fairfax County, Virginia sustained a demurrer to the Motion for Judgment on March 9, 1990.

(e) The grounds on which the jurisdiction of this Court is invoked are as follows:

(i) The date of the entry of the order sought to be reviewed is August 10, 1990.

(ii) There are no orders respecting a rehearing and no orders granting an extension of time within which to file the petition for a writ of certiorari.

(iii) This is a petition for a writ of certiorari and not a cross-petition for a writ of certiorari.

(iv) The statutory provision believed to confer on this Court jurisdiction to review the order in question by writ of certiorari is Title 28, Section 1257 of the United States Code.

(f) The constitutional provision involved in the case is the Seventh Amendment to the Constitution of the

United States Right of Trial by Jury,
which states: In suits at common law,
where the value in controversy shall
exceed twenty dollars, the right of trial
by jury shall be preserved, and no fact
tried by a jury shall be otherwise re-
examined in any court of the United
States than according to the rules of the
common law.

Table of Contents

	Page
Statement of the Case	1
Statement of the Facts	5
Ms. Ruble Was Under Antidepressant Medication	6
Ms. Ruble Testified Falsey	7
Ms. Ruble Admitted she Never saw Mr. Mitrano Tether the Dog in Dispute Outside	17
The Health of the Dog in Dispute was Never in Dispute	18
The Closest Ms. Ruble was to the Dog was When she Drove by	21
The Animal Warden Involved in the Arrest had Never Even Seen the Dog in Dispute	21
The Dog in Dispute Was Provided Necessary Shelter	23
Judge Kimble Ruled it Did not Matter Who Owned the Dog in Dispute	28
Judge Kimble Ruled That it Did Not Matter What Type of Dog the Dog in Dispute Was	29
Argument	30
Conclusion	39

Appendix

	Page
Order Refusing Petition for Appeal	41
Order Sustaining Demurrer	42
Motion for Judgment filed in Trial Court	44

Table of Authorities

	Page
1. <u>Giant of Virginia v. Pigg</u> , 207 Va. 679, 152 S.E.2d 271 (1967)	38
2. <u>Lee v. Southland Corp.</u> , 219 Va. 23, 244 S.E.2d 756 (1978)	34, 37
3. <u>Lentz v. Morris</u> , 236 Va. 78, 372 S.E.2d 608 (1988)	33
4. <u>Rosillo v. Winters</u> , 235 Va. 268, 367 S.E.2d 717 (1988)	33
5. <u>Willeroy v. Commonwealth</u> , 181 Va. 779, 27 S.E.2d 211 (1943)	36, 37

Other Authorities

6. Section 18.2-403.1 of the Code of Virginia, as amended	30
7. Section 3.1-796.122 of the Code of Virginia, as amended	30
8. <u>Criminal Offenses and Defenses</u> in <u>Virginia</u> , by Roger D. Groot, The Harrison Company, Publishers	38
9. <u>Wind Effects on Structures:</u> <u>An Introduction to Wind Engineering</u> , by Emil Simiu and Robert H. Scanlan, A Wiley-Interscience Publication, John Wiley & Sons	24



Statement of the Case

This Petition for Writ of Certiorari arises from the arrest of the petitioner, Mr. Peter Paul Mitrano, on Sunday, December 3, 1989, on criminal charges "for caus[ing] or commit[ting] cruelty to an animal, namely a male dog." At the trial on January 10, 1990, in the General District Court of Fairfax County, Virginia, Judge Kimble found Mr. Mitrano not guilty of said charges.

Thereafter, on February 7, 1990, the petitioner, Mr. Peter Paul Mitrano, filed a Motion for Judgment in the Circuit Court of Fairfax County, Virginia, based on a cause of action for malicious prosecution against the respondent, Ms. Karin C. Ruble. Ms. Karin C. Ruble had previously appeared before Mr. Floyd Wyatt, a Magistrate for the County of Fairfax, Virginia, and had caused Mr. Wyatt to

issue the warrent for the arrest of Mr. Peter Paul Mitrano for the above-stated criminal charges.

On March 9, 1990, Judge Jamborsky of the Circuit Court of Fairfax County, Virginia, sustained a demurrer filed by one of the law firms representing the respondent. On April 5, 1990, Mr. Peter Paul Mitrano filed a Notice of Appeal at the Clerk's Office of the Circuit Court of Fairfax County, Virginia. On June 8, 1990, Mr. Mitrano filed a Petition for Appeal at the Clerk's office of the Supreme Court of Virginia. On August 10, 1990, the Supreme Court of Virginia refused to hear said Petition for Appeal. This Petition for Writ of Certiorari is filed within the required ninety days of said August 10, 1990.

The allegations in the underlying criminal proceedings against Mr. Mitrano as supported by the Motion for Judgment and the transcript of said criminal pro-

ceedings attached to said Motion for Judgment are that in early November, 1989, Mr. Ruble, the husband of the appellee, advised Mr. Mitrano that if the dog in dispute was loose again, that he was going to call the animal control to pick up said dog. (Tr. 116.) (The "Tr." cite is to the transcript attached to the Motion for Judgment filed before the trial Court.) Thereafter, Ms. Ruble who testified she was taking an antidepressant medication identified as Prozac (Tr. 28), stated that the dog in dispute was tethered on the property of Mr. Mitrano. The only factual allegation directly against Mr. Mitrano was that the dog was outside tethered underneath the deck on said property for two hours on the Sunday afternoon of December 3, 1989. Judge Kimble found said area to be sheltered. (Tr. 130.) The Officer involved in the arrest, Animal Warden

Clark, testified that she had never even seen or observed the dog in dispute. (Tr. 36.)

An arrangement or agreement was made at the time the arrest warrant was issued by the Magistrate, Mr. Wyatt, the Animal Warden, Ms. Clark and Ms. Ruble that if Mr. Mitrano agreed to release the dog to the animal control that dismissal could be granted by the court. Both Ms. Ruble and the Animal Warden, Ms. Clark testified under oath at the criminal proceedings against Mr. Mitrano that no such agreement was made at the time the arrest warrant was issued; however, Ms. Clark later testified at said criminal proceedings that her report prepared on the day of said arrest stated:

"'Mr. Whyatt (sic), Magistrate, advised that should Mitrano agree to release the dog to my permanent custody that dismissal could be granted by the court. Mrs. Ruble agrees with this, her main concern is the dogs welfare." (Tr. 39-40.)

The thrust of Ms. Ruble's testimony at the criminal proceedings was that the dog in dispute was outside in the cold weather. (Tr. 10-11.) Judge Kimble ruled at the criminal proceedings that most people would not consider the temperatures in which the dog in dispute was outside to be adverse temperatures for animals. (Tr. 128-129.)

Statement of the Facts

Mr. Ruble testified that he advised Mr. Mitrano at the beginning of November, 1989, that if the dog in question was loose again that Mr. Ruble was going to call the Animal Control. (Tr. 116.) Thereafter, Mrs. Virginia Lee Mitrano, the wife of Mr. Mitrano, testified that except for December 3, 1989, she was the person who tied up the dog. (Tr. 109.)

Ms. Ruble Was Under
Antidepressant Medication

Ms. Ruble admitted during the criminal proceedings that she was taking an antidepressant identified as Prozac. (Tr. 12.) Mrs. Ruble testified:

"BY MR. MITRANO:

"Q. Have you taken any medication, drugs or medicine during November '89, December '89, and/or January 1990?

"JUDGE KIMBLE: That goes to your powers of observation, so answer the question.

"WITNESS: Do I have to answer the question?

"JUDGE KIMBLE: Yes, he's trying to establish if there was something that you were taking that would have effected your ability to accurately observe what you saw. It's a proper question.

"WITNESS: Would you repeat the question please so I can get the dates correct.

"BY MR. MITRANO:

"Q. Have you taken any medication, drug, or medicine during the months of November 1989, December 1989, and/or January 1990?

"A. Yes, I've taken medications.

"Q. Which medications have you taken?

"A. I've taken antibiotics and
I've taken an anti-depressant.

"Q. What type of anti-depressant?

"A. It's called Prosac (sic).

"Q. And how long have you been on
Prosac (sic)?

"MR. BRIGLIA: I object, Your Honor,
the question was on those dates---

"JUDGE KIMBLE: Sustained.

"BY MR. MITRANO:

"Q. On how many occasions have you
taken Prosac (sic) during----

"JUDGE KIMBLE: Sustained." (Empha-
sis added.) (Tr. 12- 13.)

Ms. Ruble Testified Falsely.

The transcript of the criminal pro-
ceedings attached to the original copy of
the Motion for Judgment filed February 7,
1990, clearly shows that Ms. Ruble testi-
fied falsely at said criminal proceedings.
Petitioner, Mr. Mitrano, further contends
that additional testimony of Ms. Ruble
that may not appear false within said

transcript is also false; however, for the purposes of this Petition for Writ of Certiorari, Mr. Mitrano will concentrate on the false testimony of Ms. Ruble that is most apparent from the face of said transcript. For example, Ms. Ruble testified falsely about the agreement that was made at the time the arrest warrant for Mr. Mitrano was issued. Ms. Ruble testified that there was no agreement that the charges could be dropped if the dog was released when questioned by Judge Kimble who was the judge presiding at the criminal proceedings against Mr. Mitrano.

Ms. Ruble testified:

"BY MR. MITRANO:

"Q. When you obtained the arrest warrant in this case, was there an agreement that the charges would be dropped by the court if--if I may finish?

"JUDGE KIMBLE: Let him finish the question.

"BY MR. MITRANO:

"Q. If I agreed to permanently give

up the dog to the Animal Control and I believe that agreement was made between you and Officer Clark, and the magistrate.

"JUDGE KIMBLE: The objection is overruled. A perfectly legitimate question. Was there some sort of an agreement that if he got rid of the dog that his charges might be dropped?

"WITNESS: No." (Emphasis added.) (Tr. 29.)

Even Animal Warden Clark denied the existence of said agreement but later admitted her report stated to the contrary that there was such an agreement. Ms. Clark testified:

"Q. Was there an agreement made with the magistrate at the time the arrest warrant was issued that if I gave up or--strike that. If the dog was given up permanently to the animal control, that these charges could or would or maybe be dismissed in court?

"A. There was not an agreement persay (sic). I asked the magistrate that, what we ordinarily do in animal control prior to making a cruelty charge of any sort is we offer, if the person, the owner of the dog is willing to give the dog up to us in lieu of receiving a warrant and saving a lot of time and effort, etc, so we can get the dog out of the situation as it is in there and finding it a new home. I

was there after the time and was told that regardless if you gave the case up under this state code, the only way any dismissal could be met is by coming to court. The charges couldn't be dropped by me. The court is the only one who could dismiss the charges.

"Q. But do you agree in essence of what I stated?

"JUDGE KIMBLE: She's already explained what happened.

"MR. MITRANO: I'd like to refer to your notes from your report of December the 3rd 1989. And do you have those in front of you?

"WITNESS: I do.

"MR. BRIGLIA: Your Honor, may I be allowed to see those?

"JUDGE KIMBLE: Yes.

"MR. MITRANO: I'm going to refer to the end of the first paragraph, starting with Mr. Whyatt, Magistrate.

"JUDGE KIMBLE: I will tell you Mr. Mitrano that the only person who can dismiss the charges is the court.

"MR. MITRANO: Thank you, Your Honor.

"JUDGE KIMBLE: She can't do it.

"MR. BRIGLIA: Does Mr. Mitrano intend on introducing this report as evidence?

"MR. MITRANO: No, I'm asking the witness to read from the report starting with Mr. Whyatt at the end of the first paragraph. Let me read it and then ask you if this is a correct statement that you made. If I may continue?

"MR. BRIGLIA: Your Honor, Mr. Mitrano would be testifying. I would object to the admission of the warden's reading her report into the record. I believe the warden's report as well as a police report are inadmissible. Can only be used to refresh the officers memory.

"MR. MITRANO: Your Honor, I contend I'm using this for impeachment purposes.

"JUDGE KIMBLE: If there is a prior inconsistent statement in there, he can impeach.

"BY MR. MITRANO: Let me read this in the record and ask you. I'm going to read from your report and ask you if this is the statement in your report. 'Mr. Whyatt, Magistrate, advised that should Mitrano agree to release the dog to my permanent custody that dismissal could be granted by the court. Mrs. Ruble agrees with this, her main concern is the dogs welfare.' Is that a statement you made in your report on December 3rd?

"A. Yes, it is.

"JUDGE KIMBLE: That's really not an inconsistent statement though, Mr. Mitrano. It could, if you re-

Mr. Mitrano. It could, if you release a dog, it could be dismissed. That is absolutely correct. That is not saying, that's not an agreement that it will be dismissed.

"MR. MITRANO: My question to her included the word, 'would, could or may,' when I asked the question from her.

"JUDGE KIMBLE: You're being a little technical. Go on." (Emphasis added.) (Tr. 37-40.)

Ms. Ruble also falsely testified that she observed the dog in dispute outside for two continuous hours on the date of the arrest of Mr. Mitrano, December 3, 1989. Mrs. Ruble testified:

"Q. How long are you contending he was outside on December 3rd?

"A. I observed him out there for at least two hours.

"Q. What times were they?

"A. Twelve to two. Approximately 12:00 to 2:00.

"Q. Noon to 2:00 o'clock? That's 2:00 o'clock in the afternoon?

"A. Yes, sir." (Tr. 16.)

• • •

"Q. And when you quoted these time frames, was that a continuous--did

you sit there and watch except I think on November 20th you said there was three hours in the morning and three hours in the afternoon. But other than that date, did you sit there and watch the dog be outside continuously the time period that you testified?

"A. No I don't make it a habit to do that.

"Q. So you don't know that the dog was out there continuously for the time period----

"A. I know that on the 21st he was out there continuously.

"Q. Because you did watch that day?

"A. Yes I did, and on the 3rd. After Warden Clark had asked us to continue to observe the situation, I did.

"Q. Okay. So, on the 21st of November and December 3rd, you did watch continuously?

"A. Yes." (Emphasis added.) (Tr. 19-20)

Mr. Barry Geisler, who is employed as General manager of the Patriot Center, testified that the Sesame Street performance on December 3, 1989, began at 1:05 P.M. and ended at 2:35 P.M. (Tr. 51-52.)

Miss Jennifer Mangam testified that shortly before the above-stated performance began that Mr. Peter Paul Mitrano drove (1) Ms. Jennifer Mangam, (2) Mr. Mitrano's wife and his two children, (3) the neighbor and her child and (4) the dog in dispute to said performance. (Tr. 53-55.) Miss Mangam also testified that Mr. Mitrano and the dog were waiting in the car when Miss Mangum departed from said performance. (Tr. 54-55.) Miss Mangam testified:

"Q. Would you tell me if you saw me on December the 3rd, 1989?

"A. Yes, I did.

"Q. And what was the contact that we had on that day?

"A. You were going to carry your wife and your two kids----

"JUDGE KIMBLE: You're going to have to speak up. I can't hear you very well.

WITNESS: You were going to carry your wife and your two kids and myself and a friend to the Sesame Street, the Patriot Center.

"BY MR. MITRANO:

"Q. Was that the 1:00 o'clock performance?

"A. Yes, the 1:00 o'clock performance.

"Q. Did I take the neighbor, Ambrwick (sic) and her child and also the dog?

"A. Also the dog.

"Q. And did I drop you off in front of the Patriot Center entrance?

"A. Yes you did.

"Q. And how much sooner were you dropped off prior to the performance starting about?

"A. We left your home about a quarter to one. And you picked us up about a quarter to three.

"Q. Okay. Do you know how long you were waiting when you got to the Patriot Center before the performance started, approximately?

"A. About five or ten minutes." (Tr. 53-55.)

Accordingly, Mr. Mitrano contends that Ms. Ruble falsely testified when she testified that she observed the dog in dispute outside continuously for two hours from 12:00 noon to 2:00 P.M. on December 3, 1989. It

would have been impossible for the dog to be both outside as claimed by Ms. Ruble and in the car driving to the Sesame Street performance shortly before 1:00 P.M. as testified by Miss Mangam.

Ms. Ruble also falsely testified about the cold temperatures when the dog in dispute was outside. Mrs. Ruble testified:

"A. For the two week period between November 5th and November 19th..."

...

"A. There were days that it was very cold...." (Tr. 7-8)

Judge Kimble stated in her decision that:

"So, as much as I dread to think, Mr. Mitrano, how much money you must have spent to bring all this stuff in here..." (Tr. 127)

...

"So, I can't say based on the meteorological evidence and records of the National airport, official records of the National airport, that it was particularly cold. Now, to somebody who is used to 90 degree weather, it was cold. But when I think of animals being out, I don't

think of the 50's as being adverse temperatures on them. I don't think most people do." (Tr. 128-129.)

Ms. Ruble Admitted
She Never Saw Mr. Mitrano
Tether the Dog in Dispute
Outside.

Even though Ms. Ruble swore out a warrant for the arrest of Mr. Mitrano for cruelty to animals, Ms. Ruble admitted in the criminal proceeding that she never saw Mr. Mitrano tether the dog in dispute. Ms. Ruble testified:

"BY MR. MITRANO:

"Q. Did you see anybody put the dog outside on any of these days that you're talking about?

"A. No, I did not actually see someone put the dog outside. I drove by or looked out and saw the dog tied up. And I did not see someone walk out and tie him.

"Q. So you never saw the defendant in this case tie the dog up on any of these days, is that correct?

"A. No, as I just said, I did not see the person who tied him up. (Emphasis added.) (Tr. 19-20.)

The Health of the Dog in Dispute Was Never in Dispute.

The Commonwealth's attorney represented to the Court in the criminal proceedings against Mr. Mitrano that the health of the dog in dispute was not an issue. (Tr. 112.) The Commonwealth's attorney stated:

"MR. BRIGLIA: Your Honor, the health of the dog in not an issue in this matter." (Tr. 112.)

Dr. Michael Wise, a licensed veterinarian who was admitted as an expert (Tr. 90) testified that the temperatures in question did not have any adverse effects on the dog in question. (Tr. 95-96.) Dr. Wise completed his residency in Minnesota (Tr. 89) and has studied animal genetics which involves nutrition and the ability of animals to conserve heat and lose heat. (Tr. 96.) Dr. Wise testified that dogs have an extreme ability to keep themselves warm. (Tr. 96-97.) Dr. Wise testified that:

"Dogs in general, whether it be a small dog or large dog, I don't care whether it is in Alaska or it's in Maryland, have an extreme ability to keep themselves warm... The animal was designed to be outside. So, as a rule, and based on everything I read in my experience and other people experiences, we have just not seen cold related problems... People have decided to keep an animal outside in cold weather. A lot of animals, mostly when it gets cold, these animals--they like cold weather." (Emphasis added.) (Tr. 96-97.)

Dr. Wise further testified that a dog's hair was similar to a fur coat and that it conserves heat and provides protection from the wind. (Tr. 97-98.) Dr. Wise also stated that cold weather with temperatures of 30 degrees or 25 degrees or even zero degrees would not adversely effect dogs. (Tr. 100.) Dr. Wise testified that from his examination of the dog in question, said dog would be fine in the cold weather. (Tr. 103-104.) Dr. Wise also testified that he had recently examined the dog and the dog was in good health. (Tr. 93.) Mrs. Mitrano, a nur-

se, testified that she did not consider the weather in question to be a problem for the dog. She testified:

"Q. Did you consider it too cold for the dog to be outside during November and the first few days of December?

"A. No. He loves the cold weather. Yesterday it was in the 30's and I could hardly get him in. He was running around. He's got a thick coat of hair. And he loves-- he hates the heat. (Tr. 113-114.)

Even Animal Warden Long who was not the arresting warden and who examined the dog on November 21, 1989, stated the dog was fine. (Tr. 44.) Miss Long testified:

"Q. What was the condition of the dog when you arrived?

"A. He appeared to be fine." (Tr. 44.)

Judge Kimble found that the dog was healthy. (Tr. 129.)

The Closest Ms. Ruble Was
to the Dog Was When She
Drove by.

Ms. Ruble testified that the closest she was ever to the dog was when she was driving by in her car. (Tr. 23, 24.) She testified:

"A. I was as close as probably ten feet as I passed by in my car.

"Q. Okay, that was driving by though, right?

"A. Yes.

"Q. Is that the closest you were ever to the dog?

"A. On these occasions or ever?

"Q. On the occasions that you're complaining about today.

"A. Yes." (Tr. 23.)

The Animal Warden
Involved in the Arrest had
Never Even Seen the Dog
in Dispute.

Ms. Clark, the animal warden involved in the arrest had never even seen the dog in dispute prior to and including the date

of the arrest of Mr. Mitrano on December 3, 1989. (Tr. 36.) Ms. Clark testified that:

"Q. Did it come a time when you ever responded to this address again?

"A. Yes, sir, I did.

"Q. And when was that?

"A. That was December 3.

"Q. And what occurred on that date?

"A. That day, I was just coming on duty at two in the afternoon. I received a call from Mrs. Ruble stating that Mr. Mitrano's dog was tethered outdoors. At that time, I told her I would respond as soon as possible. I was waiting to catch the unit coming in so I could have a camera to go and observe the situation first hand for myself. In that--before I could get to the Mitrano residence with Mrs. Ruble, the dog was indoor at that time. Also, at 2:00 P.M. when I spoke with Mrs. Ruble, I called the weather services and they advised----

• • •

"MR. BRIGLIA: Did you have any contact with Mr. Mitrano on that day?

"A. No, I did not, sir." (Tr. 35-36.)

• • •

"Q. Is it correct that up until the time, December 3rd when the arrest warrant was issued that you had never seen the dog in question?

"A. That's correct, sir." (Tr. 36.)

• • •

"Q. Okay. Did you accompany Mrs. Ruble to the magistrate's office on December 3rd?

"A. I did." (Tr. 36-37.)

The Dog in Dispute Was
Provided Necessary Shelter.

Dr. Robert Scanlan, a professional engineer, is presently a professor of engineering at John Hopkins University (Tr. 57) and previously had been a professor for twenty years at Princeton University. (Tr. 59-60.) Dr. Scanlan was head of the structures and mechanics division of the civil engineering department while at Princeton University. (Tr. 60.) Dr. Scanlan has doctoral degrees from both

M.I.T. and the Sorbonne, Paris, in engineering mechanics which are closely related to wind engineering. (Tr. 59.) Furthermore, Dr. Scanlan is author of the book "Wind Effects on Structures". (Tr. 60.)

Judge Kimble ruled that there was no question that Dr. Scanlan was an expert in the area of wind and the effect of wind on structures. (Tr. 61.)

Dr. Scanlan testified that the boundary layer effect was one of the most important aspects of wind engineering. (Tr. 62.) Basically, the boundary layer effect in wind engineering is the explanation of why when you are on a high bridge it appears more breezy than when you are close to the ground. (Tr. 62.) The wind actually decreases in speed as you become closer to the ground. (Tr. 62.) The speed of wind decreases almost to a zero value close to the ground. (Tr. 62.)

Dr. Scanlan explained that there are mathematical formulas for determining the speed of wind at a particular height. (Tr. 62-63.) The wind velocity that is given from the meteorological tower at Dulles International Airport and Washington National Airport is given at the tower level which is located 20 feet above the ground. (Tr. 62.) Dr. Scanlan visited the site where the dog was located. (Tr. 61.) Dr. Scanlan calculated the speed of the wind for the height at which the dog in question was located to be approximately one third of the wind speed reported in meteorological data at Dulles International Airport and Washington National Airport. (Tr. 65-66.) Dr. Scanlan also testified that the trees in the back yard of Mr. Mitrano's house provided a very effective shelter from the wind. (Tr. 67.) He stated that said trees filter the air and slow it down even more. (Tr. 67.) He also testified that said

trees also catch any high speed wind over the top of the trees and projects the wind to the upper part of the house. (Tr. 67.) Dr. Scanlan stated that this wind shelter effect of trees is very well known to farmers and that farmers use trees for this purpose. (Tr. 67.)

Dr. Scanlan further testified that the steps to the deck and the deck in the backyard of Mr. Mitrano's home provided further protection to the dog in dispute. (Tr. 71.) Judge Kimble found this area to provide shelter to the dog in question. (Tr. 130.)

Dr. Scanlan also testified that houses do release heat to the outside. (Tr. 72.)

Mr. Stewart Brown, an expert meteorologist, presented the Court at the criminal proceeding the certified weather reports by the hour for the month of Novem-

ber, 1989, and December 1st, 2nd and 3rd, 1989. (Tr. 77-79.)

Mr. Brown also testified that the term "wind chill" as it is used today is somewhat misleading. (Tr. 81.) He stated the term was developed back in 1920 by a scientist in the Anartic to determine the effects of wind and temperature on the rate of cooling. (Tr. 81.) He further stated that presently said rates of cooling have been converted to what is called an equivalent temperature which is actually a fictitious temperature. (Tr. 81.) Mr. Brown testified that said fictitious temperature can vary from one person to another person because of an individual's metabolism. Mr. Brown testified that the term "wind chill" has no application to animals and only has an application only to human skin. (Tr. 82-83.)

Judge Kimble Ruled it Did
Not Matter Who Owned the
Dog in Dispute.

Judge Kimble ruled that she was not concerned with who was the owner of the dog. (Tr. 106.)

Mrs. Mitrano testified that she had had experience with animals:

"WITNESS: I am an nurse."

— "JUDGE KIMBLE: Get to the point.

"BY MR. MITRANO:

"Q. What is your experience with animals?

"A. Well, I grew up on a farm in Minnesota and my father thought it was important that we had animals. We had horses, dogs, pigs, sheep, all this. I've been around animals all my life.

"Q. Does it get cold in Minnesota?

"A. Yes, it gets very cold.

"Q. Who owns the dog in dispute?

JUDGE KIMBLE: I already told you. It doesn't matter who owns the dog, Mr. Mitrano. The statute says person, whether belonging to himself or another." (Tr. 108.)

Judge Kimble Ruled
That it Did Not
Matter What Type of Dog
the Dog in Dispute Was.

Ms. Ruble testified:

"BY MITRANO:

"Q. What formal education do you have concerning dogs or medicine?

"JUDGE KIMBLE: Sustained. Objection is sustained. Go to your next question.

"BY MR. MITRANO:

"Q. What is your basis for saying the dog is a Poodle or a Poodle mixture?

"A. Just observation--my observation.

"Q. And what experience do you have in determining types of dogs?

"MR. BRIGLIA: Your Honor?

"JUDGE KIMBLE: Objection sustained. It doesn't matter what kind of dog it is. It's a small little dog.

"MR. MITRANO: I contend it does matter what kind of dog it is, Your Honor.

JUDGE KIMBLE: All she says is from her observation. If you have other evidence, you can put it on. That's all she can testify to is what her guess is." (Tr. 26-27.)

Argument

Mr. Peter Paul Mitrano was charged with the following Code of Virginia violations:

"[Section] 18.2-403.1 Offenses involving animals -- Class 1 misdemeanors.-- The following unlawful acts and offenses against animals shall constitute and be punished as a Class 1 misdemeanor:

"1. Violation of Section 3.1-796.122 pertaining to cruelty to animals...."

Under Section 3.1-796.122 Mr. Peter Paul Mitrano was charged as follows:

"[Section] 3.1-796.122. Cruelty to animals; penalty. -Any person who...(ii) deprives any animal of necessary sustenance, food, drink or shelter...shall be guilty of a Class 1 misdemeanor."

The Motion for Judgment which was filed on February 7, 1990, against Ms. Ruble clearly states in pertinent part that:

"3. On December 3, 1989, defendant falsely, maliciously, and without any reasonable or probable cause whatsoever, appeared before Mr. Floyd Wyatt, a Magistrate for the County of Fairfax, Virginia..."

• • •

"7. Defendant instigated and procured this prosecution of plaintiff falsely, maliciously, with intent to injure plaintiff's reputation in the community and with full knowledge that the charge was without any reasonable or probable cause whatsoever."

On February 27, 1990, one law firm for Ms. Ruble served by mail her Answer and Grounds of Defense which was filed with the Clerk of the Circuit Court of Fairfax County on February 28, 1990. A Demurrer was filed by a second law firm for Ms. Ruble on February 28, 1990. An Amended Demurrer was served by mail by said second set of attorneys on March 5, 1990, that stated in part that:

"2. However, probable cause did exist for the violation charged against Plaintiff, as is demonstrated by the transcript of the criminal proceeding attached to Plaintiff's Motion for Judgment as an exhibit.

"3. Because probable cause existed at the time the criminal charge was brought against Plaintiff, his Motion for Judgment fails

to allege a cause of action for malicious prosecution under Virginia Law.

"4. In addition, Plaintiff's Motion for Judgment fails to state any actual basis for the malice alleged against Defendant."

On March 9, 1990, Judge Jamborsky of the Circuit Court of Fairfax County, Virginia, sustained said Demurrer. Mr. Mitrano contends that Judge Jamborsky clearly erred in sustaining said demurrer.

Mr. Mitrano's position is that Mr. Mitrano clearly pleaded that there was no probable cause for the arrest of Mr. Mitrano. Mr. Mitrano also states that the transcript of the criminal proceedings attached to the Motion for Judgment further supports that there was no probable cause for the arrest of Mr. Mitrano. Said attached transcript of the criminal proceeding is not petitioner's entire case against Ms. Ruble, Mr. Mitrano has additional evidence and testimony to present in his action against Ms. Ruble. Further-

more, even if the said transcript presented a question of whether there was probable cause (which appellant steadfastly denies), the issue of whether there was probable cause would be a question for the jury to decide since there would be obvious questions of fact to decide.

A demurrer admits all material facts properly pleaded as this Supreme Court of the United States well knows and as Supreme Court of Virginia held in Lentz v. Morris, 236 Va. 78,80, 372 S.E.2d 608, 609 (1988):

"We shall examine the allegations of the motion for judgment according to the familiar principle that a demurrer admits the truth of all material facts properly pleaded. Under this principle, 'the facts admitted are those expressly alleged, those which fairly can be viewed as implied alleged, and those which may be fairly and justly inferred from the facts alleged.' Rosillo v. Winters, 235 Va. 268, 270, 367 S.E. 2d 717, 717 (1988)."
Id.

In Lee v. Southland Corp., 219 Va. 23, 244 S.E.2d 756 (1978), the Court held in an action involving malicious prosecution that when the facts are in dispute, the issue of probable cause is to be resolved by the triers of fact. In Lee v. Southland Corp., supra, the defendants would not have requested that a warrant be issued if the plaintiff had paid to fix the broken glass in a certain door. In the instance case, the evidence was that the action could have been dismissed if the dog in dispute was given permanently to the animal control. In Lee v. Southland Corp., supra, the Court ruled in part that:

"Probable cause in malicious prosecution actions is defined as 'knowledge of such a state of facts and circumstances as excite the belief in a reasonable mind, acting on such facts and circumstances, that the plaintiff is guilty of the crime of which he is suspected.'" (Citations omitted.) Id., at 217 Va. 26, 244 S.E.2d 758-759.

In the criminal proceeding against Mr. Peter Paul Mitrano Judge Kimble ruled that:

"...So, I can't say based on the meteorological evidence and records of the National Airport, official records of the National Airport, that it was particularly cold. Now, to somebody who is used to 90 degree weather, it was cold. But when I think of animals being out, I don't think of the 50's as being adverse temperatures on them. I don't think most people do." (Emphasis added.) (Tr. 128-129.)

It is clear from the above-quoted portions of Judge Kimble's decision that there was not probable cause for arresting Mr. Mitrano even if Mr. Mitrano had been responsible (which Mr. Mitrano denies) for the dog in dispute on all the days on which Mrs. Ruble sworn in her warrant that Mr. Mitrano had been cruel to said dog.

Mr. Mitrano contends there were very few allegations connecting Mr. Mitrano to any sort of alleged cruelty (which Mr. Mitrano denies) to the dog in dispute. Is Mr. Mitrano responsible for the actions

and inactions of his wife, Mrs. Mitrano, even if said allegations were a crime (which Mr. Mitrano denies)? The Supreme Court of Virginia decided a case in which there was a charge of cruelly and unnecessarily killing of a dog in Willeroy v. Commonwealth, 181 Va. 779, 27 S.E.2d 211 (1943). In that case, Mr. Willeroy raised chickens and two dogs were known by him to kill his chickens. One day before supper Mr. Willeroy killed one of the dogs approaching his chickens. Mr. Willeroy was then arrested on the charge of cruelly and unnecessarily killing said dog. Mr. Willeroy then went to Police Headquarters and was released and went home and ate supper. After supper, Mr. Willeroy killed the second dog that would not leave his property. In Willeroy v. Commonwealth, supra, the Court stated in part that:

"From time immemorial people have been attached to their dogs and their dogs to them. Tobit's dog

went with him. The anthology of every land is filled with eloquent tributes of affection...

...

"...Surely he could not be sent to jail if the Commonwealth, without more, showed that he killed a dog." Id., at 181 Va. 781, 783, 27 S.E.2d 211, 212.

Mr. Mitrano contends that it was absolutely ludicrous for Mr. Mitrano to be arrested for cruelty to a dog when the only testimony was that Mr. Mitrano was with said dog for about two hours on a Sunday afternoon wherein Mr. Mitrano drove said dog back and forth to a Sesame Street performance. Mr. Mitrano contends there was absolutely no probable cause for his arrest.

In Lee v. Southland Corp., supra, the Court also ruled that "legal malice may be inferred by the jury from want of probable cause (Citation omitted)." Id., at 219 Va. 27, 244 S.E.2d 759. The Court also stated in Lee v. Southland Corp., supra,

that the "issue of existance or non-existance of probable cause for the issuance of the warrant was a factual question for the jury." Id. Accordingly, Mr. Mitrano contends that if there is a question of the existance or non-existance (Mr. Mitrano contends probable cause is non-existent), then Mr. Mitrano should not be deprived of having a jury determine the same as he demanded in his Motion for Judgment. "The opinion or belief of the prosecutor is not the test of probable cause." Giant of Virginia v. Pigg, 207 Va. 679, 684, 152 S.E.2d 271, 276 (1967).

Petitioner further refers to the book entitled Criminal Offenses and Defenses In Virginia, by Roger D. Groot, The Harrison Company, Publishers wherein under a discussion of Cruelty to Animals it states in part that:

"...One series of verbs (override, overdrive, overload) describes ill-use and creates a strict liability class 1 misdemeanor. Willfully in-

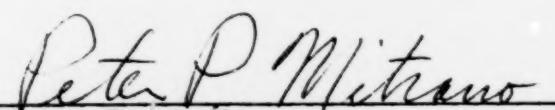
flicting inhumane injury and cruelly treating any animal are also proscribed; conviction under this language of the class 1 misdemeanor requires proof of intent to cause pain or death.

"The thrust of [Section] 18.2-144 is protection of the owner's property interest rather than protection of the animals themselves...." Id., at p. 13-14 of 1985 Supplement.

CONCLUSION

Petitioner, Peter Paul Mitrano, Pro se, respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari so that petitioner is not denied the opportunity to have his cause of action heard by a jury.

Respectfully submitted,


Peter Paul Mitrano
Pro se
Post Office Box 190
Fairfax Station, Virginia 22039
(703) 591-7250

Dated: November 6, 1990.



APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at
the Supreme Court Building in the City of
Richmond in Friday the 10th day of August,
1990.

Karin C. Ruble, Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy.

Teste:

David B. Beach, Clerk

By:

Deputy Clerk

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

PETER PAUL MITRANO,)
Plaintiff,)
v.) At Law No.
KARIN C. RUBLE,) 95389
Defendant.)

ORDER

UPON CONSIDERATION of Defendant's Demur-
rer, as amended, and upon oral argument by
both Plaintiff and Defendant, it is this
9th day of March, 1990, by the Circuit
Court for Fairfax County, Virginia,

ORDERED, that Defendant's Demurrer be,
and it hereby is, GRANTED; and

ORDERED, that Plaintiff's Motion for Judgment is Dismissed with prejudice.

THIS IS A FINAL ORDER.

/S/
Judge Richard J. Jamborsky
Honorable Judge for the
Circuit
Court for Fairfax County,
Virginia

Dated: March 9 1990

WE ASK FOR THIS:

Robert A. Hill, Esquire
Arent, Fox, Kintner, Plotkin & Kahn
8000 Towers Crescent Drive, Suite 700
Vienna, Virginia 22182-2733
(703) 847-5800
Counsel for the Plaintiff

SEEN AND OBJECTED TO:

Peter Paul Mitrano, Esquire
Appearing Pro Se as the Plaintiff

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY,
VIRGINIA

Peter Paul Mitrano)
Post Office Box 190)
Fairfax Station, Virginia 22039,))
Plaintiff,))
versus)) At Law
Karin C. Ruble)) No. 95389
4920 Oakcrest Drive)
Fairfax, Virginia 22030)
Defendant.)

MOTION FOR JUDGMENT

COMES NOW the plaintiff, Peter Paul Mitrano, Pro Se, and for his Motion for Judgment, states as follows:

1. Plaintiff is a resident of Fairfax County, Virginia.

2. Defendant is a resident of Fairfax County, Virginia.

3. On December 3, 1989, defendant falsely, maliciously, and without any

reasonable or probable cause whatsoever, appeared before Mr. Floyd Wyatt, a Magistrate for the County of Fairfax, Virginia, and caused him to issue a warrant for the arrest of plaintiff on the charge of violating Section 18.2-403.1, Code of Virginia by "caus[ing] or commi[ting] cruelty to an animal, namely a male dog."

4 On December 3, 1989, defendant was arrested pursuant to said warrant.

5. Upon the trial of plaintiff on January 10, 1990, before the Honorable Barbara L. Kimble, Judge of the General District Court of Fairfax County, Virginia, after the Court heard all the evidence presented, plaintiff was found not guilty.

6. The original copy of the certified transcription of said proceedings is attached to the original copy of this Motion for Judgment filed herein with this Court.

7. Defendant instigated and procured this prosecution of plaintiff falsely, maliciously, with intent to injure plaintiff's reputation in the community and with full knowledge that the charge was without any reasonable or probable cause whatsoever.

8. By reason of defendant's actions, plaintiff has been greatly injured, in his credit and reputation and has been brought into public disrepute among the members of his community; has been hindered in the practice of his profession; has been required to spend substantial time away from his business and to expend substantial sums of money to defend against this wholly frivolous charge; has been caused much anxiety and mental anguish; and has been made the object of public scorn, ridicule and humiliation.

9. WHEREFORE, plaintiff, Peter Paul Mitrano, demands judgment against defendant, Karin C. Ruble, in the sum of two

million five hundred thousand dollars and
his costs expended in this action.

Respectfully submitted,

Peter Paul Mitrano
Post Office Box 190
Fairfax Station, Virginia
22039

Pro Se

Dated: February 7, 1990.

